# In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 590

UNITED STATES OF AMERICA, APPELLANT

*v.*

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY AND FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY*

## BRIEF OF THE UNITED STATES IN OPPOSITION TO MOTION TO AFFIRM

This brief is filed in response to appellees' contentions in their motion to affirm (1) that the only question for review here is whether the record supports the trial court's findings of fact, and (2) that the legal issues involved in this case will be determined in *United States* v. *Philadelphia National Bank*, No. 83, this Term. We also comment briefly on appellees' assertions with respect to what the record shows to have been the reasons for the merger at issue here.

1. There is no substance to appellees' assertion that "the only question for the consideration of the



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Court at this time is whether the record supports the trial court's decision on issues of fact" (M.A. 4). On the contrary, this appeal squarely presents several important legal issues. Of general significance in the enforcement of the antitrust laws is the question by what substantive standards a bank merger is to be judged under Sections 1 and 2 of the Sherman Act. Neither the district court nor appellees, in their motion to affirm, have addressed themselves at all to this issue, but that fact does not obscure the need for its authoritative resolution by this Court.

Also presented, of course, is the question whether the district court applied the proper Sherman Act standards to the merger involved in this case. Most of the district court's findings of fact are based on undisputed evidence of record—*e.g.*, that the merged banks would have 52.7 percent of the assets, 51.95 percent of the total deposits, 54.2 percent of the total loans and discounts and 79.62 percent of the trust accounts[1] of all commercial banks in the geographic market (J.S. App. 28); that the banks have been successfully operated and that the merger was not "motivated by necessity to protect their depositors or shareholders" (J.S. App. 27). The question is thus not whether "the record supports" these findings but whether the district court correctly concluded from them and from other undisputed evidence of record

[1] As we noted in our Jurisdictional Statement (p. 20), the same stipulated exhibit that establishes the merged bank's share of the trust accounts also establishes the much higher percentage that the merged bank would have of trust business as measured by dollar value of assets and earnings from trust services. See p. 3, *infra*.

that the present merger does not violate the Sherman Act.

Finally, this case presents the question whether the lawfulness of a bank merger may be assessed in terms of an appropriate submarket—here corporate fiduciary services—as well as the broader commercial banking market. The district court did not discuss this question, deciding it *sub silentio* against the government. In view of the virtual monopoly that the merged bank would have in this submarket—95 percent of the dollar value of the trust assets and 92 percent of the trust earnings of all commercial banks in the market area, according to undisputed evidence [2]—resolution of this question is of considerable importance in the enforcement of the antitrust laws.

2. Nor is there any merit to appellees' contention that whatever legal issues are involved in this case "will have been determined in *United States* v. *Philadelphia National Bank* (No. 83, this Term)" (M.A. 30). Even if the issues were identical, the appeal should not be dismissed because, on that assumption, if the government is sustained there, the judgment here must be reversed. In fact, the substantial question of public importance presented by this case are to a considerable extent complementary to those involved in the *Philadelphia National Bank* case. As in that case, the basic issues here concern the standards of the Sherman Act governing horizontal combinations of competitors. Since banking is essentially a local business, the contrast between the dollar volumes of business of the two sets of banks involved in the two cases reflects

[2] See note 1, *supra*.

the differences between the communities in which they are situated, rather than significant differences in competitive impact in their respective markets. Thus each case, in its own setting, is important for its bearing upon the current bank merger movement (see J.S., p. 10, note 9).

Moreover, there are important differences in the precise questions presented as between the two cases. Unlike the *Philadelphia National Bank* case, this case presents no issue as to the appropriate geographic market, and it does not involve a cause of action under Section 7 of the Clayton Act. On the other hand, this case involves charges of violation of both Sections 1 and 2 of the Sherman Act, whereas the Sherman Act charge in the *Philadelphia National Bank* case is limited to Section 1. Furthermore, this case presents the question, not presented in the *Philadelphia National Bank* case, of whether an appropriate submarket such as corporate fiduciary services may be employed in assessing the competitive effects of a bank merger.

3. There is little to be gained by debating the conflicting inferences that may be drawn from the testimony in this case, since the most critical facts are essentially undisputed. However, a word or two should be said about the "Background of Consolidation and Reasons for it" that appellees set forth at the outset of their motion to affirm (M.A. 5–9). There they argue that the prime purpose of the merger was to benefit the community by drawing to the merged bank deposits of small banks in outlying areas, thus generating more loanable funds for Lex-

ington. However, the implausibility of this explanation was demonstrated by the government's proof, which tended to establish (1) the improbability that a substantial amount of such correspondent business could or would be drawn to Lexington[3] and (2) the fact that the same ability to attract deposits could long ago have been achieved by First National in several other ways, such as capitalization of its disproportionate undivided profits,[4] the sale of stock,[5] or the establishment of an overnight transit service for clearance of checks.[6] What is even more important, the district court did not adopt appellees' theory as to the reasons for the merger; it was not discussed or even referred to in the court's opinion.[7]

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[3] See *e.g.*, GX 109, p. 4 (report of Federal Deposit Insurance Corp.).

[4] Thus, in the years prior to the merger, First National could have increased its lending limit by fully 60 percent of the increase achieved as a result of the merger simply by capitalizing a sufficient amount of undivided profits to bring its capital structure in line with that of other area banks and of banks of the same deposit size in the state and nation as a whole (GX 93; Tr. 173, 380, 819).

[5] First National gave "no consideration" to such a possibility (Def. Ans. to Interrog. 21), although there was every reason to believe that such an issue would have been successful (Tr. 173, 380–381, 437–438, 818–819).

[6] *E.g.*, Tr. 674. Such a service would have required "one man, part time" (Tr. 616).

[7] The points discussed above also bear on the plausibility of appellees' related claim that the merger was calculated to draw the deposits of local branches of national industrial corporations (M.A. 6–7). Moreover, their own witness testified that the banking needs of such concerns are met by the home offices of such companies through banks in the major financial centers, regardless of the size of the banks in which local plants may be located (Tr. 736–737).

## CONCLUSION

For the foregoing reasons and those set forth in the government's Jurisdictional Statement, probable jurisdiction should be noted.

Respectfully submitted.

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